

RICHARD W. VAN DYKE  
MARJORIE VAN DYKE

IBLA 70-101

Decided September 8, 1971

Mineral Lands: Nonmineral Entries--Public Sales: Generally

Land which is mineral in character is not subject to public sale.

Mining Claims: Determination of Validity

A mining claim on land open to the operation of the mining laws may not be declared invalid without proper notice and opportunity for hearing.

Mineral Lands: Nonmineral Entries--Public Sales: Generally

Land which is included in mining claims is not available for sale under 43 U.S.C. § 1171 (1964) prior to a determination of the invalidity of the claims in appropriate administrative proceedings, and such proceedings will not be instituted where any advantage to the public interest that would be derived from effecting the public sale is too slight to warrant the expense and time required to contest the claims.

Public Sales: Generally

An applicant for a public sale, having no claim or interest in the land which he has applied for and no statutory right to obtain an interest which would enable him to contest the right claimed by another in the same land, has no basis upon which to demand that the Bureau of Land Management contest the claim of another in order to determine whether the land is available for sale under the Isolated Tract Law.

IBLA 70-101 :

A 3645

RICHARD W. VAN DYKE

: Public sale

MARJORIE VAN DYKE

: application rejected

: Affirmed

### DECISION

Richard W. Van Dyke and his wife, Marjorie Van Dyke, have appealed to the Secretary of the Interior from a decision dated October 18, 1969, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Arizona land office rejecting public sale application A 3645 for the reason that the NE 1/4 SE 1/4 section 8, T. 6 N., R. 4 E., G.&S.R.M., Arizona, is mineral in character and because an active mining claim embraces approximately half of the subdivision.

The subject land embraces part of the Ophir No. 3 lode mining claim, located May 28, 1937, by A. S. Lewis, and currently owned by Jules L. Vermeersch, Jack Thomas and Beatrice W. Lewis. The land office based its mineral classification of the land upon a report of field examination of the Maricopa mining property, which includes the Ophir No. 3 mining claim and two contiguous claims, Apociram and Opoeiram No. 3, M.S. No. 4504 (Arizona). The report stated that samples taken from the Ophir No. 3 claim showed values for gold and silver, with values ranging from \$14.70 to \$23.80 per ton, and cited past production of gold from the Maricopa mining property as well as current performance of the necessary annual assessment work by the mining claimants.

Appellants contend that samples taken by the Bureau of Land Management were from the SE 1/4 NE 1/4 sec. 8, at the north end of the Ophir No. 3 claim, and so do not prove there is commercial mineralization in the subject tract. They point out that mineral samples reflecting only minimal values were taken within the Ophir No. 3 claim in the subject tract by their mining engineer, and that the mineral values reported by the Bureau's engineer, averaging \$19.25 per ton, are not high enough to offset the estimated costs, \$21.00, of mining and treatment of the mineral, absent the existence of very large tonnage. Even with large tonnage, they argue, the values reported would not necessarily cover the increased underground mining costs that would be entailed.

As noted above, a large part of the land applied for is embraced within an unpatented mining claim. It is well established that a valid mining location, so long as it is kept in accordance with the mining law, segregates the land therein from the public domain and confers an exclusive possessory right upon the locator. Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 316 (1930); Roos v. Altman et al. (On Petition), 54 I.D. 47, 53 (1932), and cases cited. Thus, if the mining claim on the land in question is valid, the land is not subject to public sale.

It is equally well settled that an invalid mining claim is a nullity. It confers no interest upon the locator and does not bar location of a valid claim by another party, entry upon the land under the public land laws other than the mining laws, or appropriation of the land for governmental use. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450, 460 (1920); Dredge Corp. v. Husite Company, 78 Nev. 69, 369 P.2d 676, cert. denied, 371 U.S. 821 (1962); John Roberts, 55 I.D. 430, 434 (1935); Skinner v. Fisher, 40 L.D. 112 (1911); Lindley on Mines §§ 216-19 (3d ed. 1914).

However, when the invalidity of a mining claim depends upon the resolution of a factual issue, such as lack of discovery of a valuable mineral deposit, the claim can be declared invalid in administrative proceedings only after notice has been given to the mining claimant and he has been afforded an opportunity for a hearing. Cameron v. United States, *supra*; The Dredge Corp., 65 I.D. 336 (1958), *aff'd*, Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966); United States v. Keith V. O'Leary et al., 63 I.D. 341 (1956). Until such proceedings are held and the claim is determined to be invalid, the Department cannot dispose of the land to others. Board of Supervisors, Mohave County, Arizona, 52 L.D. 378 (1928); Harry Yukon, A-30762 (August 23, 1967).

While appellants have raised concrete questions as to the existence of a discovery on the claim, they have not persuaded us that the Bureau's finding as to the land's mineral character is erroneous. Lands which are mineral in character are not subject to public sale. 43 CFR 2710.0-8(c) (1971), (formerly 43 CFR 2243.0-7(c)); Mrs. Marion E. Beresford, A-30015 (April 6, 1964); Rosemon Willis, A-29538 (August 27, 1963); William W. Cheetham, A-29098 (December 10, 1962).

The decision whether to offer land for public sale is a matter within the discretion of the Secretary of the Interior. 43 U.S.C. § 1171 (1964). The Bureau of Land Management has concluded from its examination of the land that it would not now be in the public interest to institute proceedings against the Ophir No. 3 mining claim. We concur with the Bureau's views. Any advantage

to the public interest that might be derived from the proposed sale is too slight to warrant the expenditure and time which would be required to contest the mining claim, and if successful, to make the land available for public sale.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management appealed from is affirmed.

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Newton Frishberg, Chairman

We concur:

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Martin Ritvo, Member

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Francis E. Mayhue, Member

